IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.06.2007

Coram :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.217 of 2004

Commissioner of Income-tax-IX,
Chennai. ..Appellant/Respondent.

Vs

G.Saroja ..Respondent/Appellant.

Appeal under Section 260A of the Income-tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai Bench 'C', Chennai in I.T.(SS)A.No.169/Mds/2000 dated 05.11.2003 for the block assessment period 01.04.1988 to 20.08.1998 against the order of the Commissioner of Income Tax [Appeals] X Chennai 34 dated 20.9.2000 in ITA.No.142/2002-03 against the order of the Asst. Commissioner of Income Tax Circle XII Chennai 600 006 dated 31.7.2002 in S 47508-S for the Block period and Assessment Ydear 1989-90 to the date of search i.e. 20.8.1998.

For Appellant : Mr.T.Ravi Kumar,
Standing Counsel for
Income-tax Department

For Respondent : Mr.Ashok Pathy

JUDGMENT

(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

This appeal is filed under Section 260A of the Income Tax Act, 1961 by the Revenue, against the order of the Income Tax Appellate Tribunal, Chennai Bench 'C', Chennai in I.T.(SS)A.No.169/Mds/2000 dated 05.11.2003 for the block assessment period 01.04.1988 to 20.08.1998. On 22.07.2004, this Court admitted the appeal and formulated the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that there was no transfer of property by the assessee to M/s.Kalpaga Builders on 10.02.1995, i.e.,

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within the block period ending 20.08.1998 within the meaning of Section 2(47)(v) of the Income-tax Act and no capital gains were assessable for the block period?"

2. The facts leading to the above substantial question of law are as under:

The assessee is an individual. There was a raid in the premises of M/s.Kalpaga Builders and its partners on 20.08.1998. The assessee is the mother-in-law of the partners of the said partnership firm. During the raid, it was noticed that the assessee was the owner of the premises. The said firm had promoted a housing project which came up on the land belonging to the assessee. There was no written agreement between the Kalpaga Builders and the assessee for this developmental work as the builder was a family concern. The property situated at No.5, Mounasamy Mutt Street was acquired by the assessee in March, 1992. M/s.Kalpaga Builders started construction of the residential flats on this property on 10.2.1995. For effecting the sale of flats and registration of documents, sale deeds and other documents were executed by the assessee in favour of various purchasers from November onwards. The assessee had received a sum of Rs.5,80,346/- out of the transfer of the total property and six residential flats towards consideration which were found to be subsequently let out to six tenants. The total consideration received by the assessee was Rs.32,32,383/-. The assessee filed her block Return for the period from 01.04.1988 to 31.03.1999 on 19.11.1999 before the initiation of proceedings under Section 158BD of the Income-tax Act ("Act" in short), by the Revenue. On 13.08.2001, the assessee was asked as to why she had filed the Return in Form 2B voluntarily before the proceedings in that behalf initiated by the Department. By letter dated 17.08.2001, the assessee requested the Assessing Officer to consider the Block Return already filed as the one filed in response to the notice under Section 158BD issued by the Revenue. The Assessing Officer completed the Block Assessment for the said block period under Section 158BA of the Act r/w Section 158BD. The computation under the Block Assessment are as follows:-

Asst year 1995-96	:	Rs.22,02,723
Asst year 1996-97	:	Rs. 27,718
Asst year 1997-98	:	Rs. 79,768
TOTAL INCOME	:	Rs.23,10,209

The Assessing Officer computed the short term capital and long term capital gains in the block period for the assessment year 1995-96 at Rs.7,73,413/- and Rs.14,29,310/-, thus totalling to Rs.22,02,723/- and the same was added in the Block Assessment. Aggrieved by the order, the assessee filed an appeal to the Commissioner of Income-tax (Appeals). The C.I.T.(A) dismissed the appeal and confirmed the order of assessment. Aggrieved, the assessee filed an appeal to the Income-tax Appellate Tribunal ("Tribunal" in short). The Tribunal allowed the appeal and set aside the orders of the lower authorities. Hence the present appeal by the Revenue.

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3. Learned Standing Counsel appearing for the Revenue submitted that, as per the sale deed between the assessee and an ultimate purchaser of the flat, one of the clauses in the said sale deed stipulates that the assessee was selling the undivided share to the purchaser subject to the condition that the purchaser should construct and own the flat allotted in his favour only through M/s.Kalpaga Builders and would enjoy the flat in terms of covenants agreed with the said promoter. M/s.Kalpaga Builders started construction on the impugned land with effect from 10.02.1995 and also the said builder had taken over possession and full control over the impugned land by 10.02.1995. Hence the transfer of land should be reckoned for the assessment year 1995-96 within the meaning of Section 2 (47)(v) of the Act. Hence the profit of sale of the land would automatically become short term capital gains assessable in the block period and more specifically pertaining to assessment year 1995-96. Hence the Assessing Officer is right in assessing it for the assessment year 1995-96 for the block period.

4. Learned counsel appearing for the assessee submitted that once the ingredients of Section 53A of the Transfer of Property Act is not satisfied, Section 2(47)(v) of the Income-tax Act cannot be invoked. It is further submitted that there is no written agreement between the assessee and the builder, which is the basic requirement for invoking the provision of Section 53A of the Transfer of Property Act. It is also further submitted that the assessee is yet to receive the amount and the assessee had shown the amount only as receivables and there is no actual receipt of the amount. Therefore, the question of transfer followed by capital gain will not arise for this block assessment period. Hence, the order passed by the Tribunal is in confirmity with law.

5. Heard the counsel. The dispute in this case is regarding the assessment year in which the transfer of land has to be assessed. It is not in dispute that there is no written agreement between the assessee and the builder. A written agreement is a basic requirement for invoking the provision of Section 53A of the Transfer of Property Act. Section 53A of the Transfer of Property Act, reads as under:-

> "53A. Part performance.-Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing to perform his part of the contract,
>
> then, notwithstanding that where there is an instrument of transfer, that the transfer has not been

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completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

In the case of Nathulal Vs. Phoolchand, AIR 1970 SC 546, the Apex Court considered the scope of Section 53A of the Transfer of Property Act and held as follows:-

"(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty; (2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract; (3) that the transferee has done some act in furtherance of the contract; and (4) that the transferee had performed or is willing to perform his part of the contract."

Section 2(47)(v) of the Income-tax Act reads as follows:-

""transfer", in relation to a capital asset, includes, -

(i) ...
(ii) ...
(iii)...
(iv) ...
(iva)...
(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or"

Section 2(47)(v) of the Income-tax Act comes into the aid of the Department only if the conditions of Section 53A of the Transfer of Property Act are satisfied. From a reading of the above provisions, it is clear that unless there is a written agreement, Section 53A of the Transfer of Property Act will not come into operation. In the present case, there is no written agreement and no sale consideration was received during the relevant period. The Revenue is also unable to prove that the assessee had put the developer in possession of the property by receiving the consideration partly or in full. The fact remains that there is no

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sale agreement between the assessee and the builder and also the assessee had not received the sale consideration. Hence, the Tribunal is right in holding that there is no transfer of property, as contemplated under Section 2(47(v) of the Act. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference.

6. In view of the foregoing reasons, we answer the question in favour of the assessee and against the Revenue. Accordingly, the tax case is dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Assistant Registrar,
   Income-tax Appellate Tribunal, Chennai Bench 'C',
   Chennai 90.

2. The Commissioner of Income-tax (Appeals) X,
   Chennai.

3. The Assistant Commissioner of Income-tax,
   Circle XII, Chennai-600 006.

4. The Commissioner of Income Tax, IX, Chennai.

+ 1 CC To Mr. N. Muralikumaran Advocate SR NO.35732

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